

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling:	)	CC Docket No. 01-92
Lawfulness of Incumbent Local Exchange	)	DA 02-2436
Carrier Wireless Termination Tariffs	)	
	)	

**MOTION TO DISMISS**

The Montana Local Exchange Carriers ("Montana LECs")<sup>1</sup> hereby move that the Federal Communications Commission dismiss the Petition for Declaratory Ruling ("Petition") filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications, and Nextel Partners ("CMRS Carriers").<sup>2</sup>

1. In seeking to invalidate LEC tariffs, the CMRS Petitioners are necessarily seeking to invalidate state commission orders that approved such tariff filings as lawful. In at least one case involving a Montana LEC, a state commission mandated that the carrier should file a tariff.<sup>3</sup>

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<sup>1</sup> The Montana LECs consist of the following rural local exchange carriers operating in Montana: 3 Rivers Telephone Cooperative, Range Telephone Cooperative, InterBel Telephone Cooperative, Northern Telephone Cooperative, Ronan Telephone Company, Lincoln Telephone Company, Hot Springs Telephone Company, Blackfoot Telephone Cooperative, and Clark Fork Telecommunications. The interest of the Montana LECs in this proceeding is further described in their comments being submitted simultaneously with this motion.

<sup>2</sup> The CMRS carriers filed their Petition on September 6, 2002 in dockets 01-92, 95-185, and 96-98. On September 30, 2002, the Commission issued DA-02-2436, calling for comments on the Petition by October 18, 2002.

<sup>3</sup> See *Order Directing Tariff Filing*, Docket No. D200.1.14, Order No. 6225 (Mont. P.S.C., Jan. 25, 2000) ("Ronan is directed to file a tariff, by February 8, 2000, containing the rates, terms, and conditions that will apply to reciprocal compensation arrangements with requesting telecommunications carriers."). A copy of this Order is attached.

Thus, this is a proceeding to preempt state law.<sup>4</sup>

2. Consequently, the CMRS Carriers were required to comply with the provision of the ex parte rules mandating that all preemption petitions be served on the affected governmental agencies.<sup>5</sup> This rule ensures that states and localities are aware of allegations made with respect to their authority.<sup>6</sup> The CMRS Carriers, however, failed to serve the affected governmental agencies. The Petition shows no signs of being served on any state commission, including the commissions in the states specifically mentioned in the Petition. Thus, this proceeding fails to comply with the notice and due process requirements of the Commission's Rules.

3. The Commission's Rules provide a very clear remedy for failing to serve the appropriate governmental agencies: "[s]uch pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under §1.1212(d) of this section and the parties are so informed." Therefore, because no such determination and notification has been completed, the Commission should

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<sup>4</sup> See *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Ct.App. Mo. 1997) (tariff approved by state commission "has the same force and effect of a statute approved by the legislature"); *Cost Management Services v. Wash. Not. Gas Co.*, 99 F.3d 943, 937, n.7, (9<sup>th</sup> Cir. 1996)(filed tariff doctrine applies to state as well as federal tariffs).

<sup>5</sup> 47 C.F.R. § 1.1206 Note 1 ("In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority, the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption.").

<sup>6</sup> See *In the Matter of Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Memorandum Opinion and Order, 14 FCC Rcd 18831, 18838 (released November 9, 1999) ("Specifically, there have been a number of instances in which petitioners seeking federal preemption of state or local authority through petitions for rulemaking or petitions for declaratory ruling have identified the actions of particular states or localities as illustrative of actions warranting such preemption. In some, the jurisdictions named in the petition were not aware of the petition or the allegations made about them in the petition.")

dismiss the Petition without further consideration, in accordance with its rules and regulations.

4. Equally important is the failure of the CMRS Carriers to serve the LECs whose tariffs are at issue. In its 1999 *Logicall* decision, the Commission confirmed that requests to invalidate tariffs should not be brought as declaratory ruling requests, but as formal complaints served upon each carrier whose tariff is targeted for invalidation.<sup>7</sup> By their Petition, the CMRS Petitioners seek precisely what *Logicall* counsels against: a broadly brushed ruling in which tariffs are invalidated without making the carriers that filed those tariffs parties to the proceeding via the formal complaint process. The Petition must, therefore, be dismissed as procedurally improper.

5. In addition, there are strong equity arguments favoring dismissal of the CMRS Petition. In asking that existing approved tariffs be declared void and unlawful, the CMRS Carriers are requesting direct interference with existing state laws and previous state commission decisions. Such a ruling could interfere with the billing and collection of lawfully tariffed rates which have already been provided for at the state level. In the interests of comity and recognition of state jurisdiction and the important state commission role in the implementation of the Telecommunications Act, if the Commission believes it should address the issue raised in the Petitions at all at this time, it should be strictly on a going-forward basis, with notice given as discussed above.

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<sup>7</sup> *In the Matter of Communique Telecommunications, Inc. d/b/a Logicall*, 14 FCC Rcd 13635, 13649 (released August 9, 1999) (“We believe generally it is preferable for the Commission to determine the lawfulness of tariff provisions in complaint actions under section 206-209 or tariff investigations under sections 204-205 – where the affected carriers are mandatory parties – rather than in declaratory rulings.”).

### **Conclusion**

For the reasons stated herein, the Montana Local Exchange Carriers respectfully requests that the Commission dismiss the Petition for Declaratory Ruling filed by the CMRS Petitioners.

Respectfully submitted,

The Montana Local Exchange Carriers

By their attorneys

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Date: October 18, 2002

## **ATTACHMENT**

Service Date: January 26, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF a Tariff Filing	)	UTILITY DIVISION
By Ronan Telephone Company Containing the	)	
Rates, Terms and Conditions for Reciprocal	)	DOCKET NO. D2000.1.14
Compensation Pursuant to 47 U.S.C. § 251(b)(5)	)	
and § 69-3-834(2)(b), MCA	)	ORDER NO. 6225

**ORDER DIRECTING TARIFF FILING**

Introduction and Background

On April 28, 1999 Blackfoot Telephone Cooperative, Inc. (Blackfoot) and Montana Wireless, Inc. (MWI) filed petitions for arbitration of a reciprocal compensation arrangement with Ronan Telephone Company (Ronan). See Docket Nos. D99.4.112 and D99.4.113. The arbitrations were suspended pending the disposal of a petition filed by Ronan pursuant to 47 U.S.C. § 251(f)(2). See Docket No. D99.4.111. On December 22, 1999 the Montana Public Service Commission (Commission) issued Procedural Order Nos. 6218 and 6219, directing that the arbitrations proceed. On that same date Ronan filed a Motion to Dismiss the arbitrations, which the Commission has granted. See Order Nos. 6218a and 6219a, Docket Nos. D99.4.112 and D99.4.113, January 25, 2000.

Discussion

Although the Commission granted Ronan's Motion to Dismiss the arbitrations, see the discussion at Order Nos. 6219a and 6219b, Ronan continues to have a duty under Montana and federal law to establish reciprocal compensation arrangements for those carriers that request them. 47 U.S.C. § 251(b)(5); § 69-3-834(2)(b), MCA; Commission Order Nos. 6219a and 6219b, Conclusions of Law, 5. Ronan acknowledges this duty. Ronan Motion to Dismiss, Docket Nos. D99.4.112 and D99.4.113, p. 4, fn. 3, December 22, 1999. Blackfoot and MWI, by their requests for negotiation and arbitration, have indicated a desire for a reciprocal compensation arrangement with Ronan, an arrangement they are entitled to by law. Therefore, the Commission will direct that Ronan file a tariff, providing the details of a reciprocal compensation arrangement that will be available to interconnecting carriers desiring such an arrangement.

Conclusions of Law

1. Ronan Telephone Company is a public utility subject to the jurisdiction of the Montana Public Service Commission. §§ 69-3-101(f) and 69-3-102, MCA.

2. Ronan Telephone Company has a duty to establish reciprocal compensation arrangements with telecommunications carriers who request them. 47 U.S.C. § 251(b)(5); § 69-3-834(2)(b), MCA.

Order

Ronan Telephone Company is directed to file a tariff, by February 8, 2000, containing the rates, terms and conditions that will apply to reciprocal compensation arrangements with requesting telecommunications carriers. In preparing the tariff Ronan must be guided by and comply with the rules of the Federal Communications Commission on reciprocal compensation, 47 C.F.R. §§ 51.701-51.717.

DONE AND DATED this 25th day of January, 2000, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chair

\_\_\_\_\_  
NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

\_\_\_\_\_  
GARY FELAND, Commissioner

\_\_\_\_\_  
BOB ROWE, Commissioner

ATTEST: Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.  
A motion to reconsider must be filed within ten (10) days. See 38.2.4806,  
ARM.



## **CERTIFICATE OF SERVICE**

I, Adrian B. Copiz, hereby certify that on October 18, 2002, I caused copies of the foregoing Motion to Dismiss filed electronically with the FCC to be served on the following:

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